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NO. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

JOSEPH GRIECO,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Respondent..

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

To The Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States:

The petitioner, Joseph Grieco, prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Illinois, numbered 41962 of that Court, which decision affirmed the judgment of the Appellate Court of Illinois, First Judicial District, in the conviction of this petitioner in the cause entitled *People of the State of Illinois, Appellee v. Joseph Grieco, Appellant.*

OPINIONS OF THE COURTS BELOW

The opinion of the Illinois Appellate Court, First Judicial District, entered December 5, 1968, is reported at 243 N.E. 2d 417, and is reprinted herein in the printed appendix and in the record filed simultaneously herewith, and certified by the Clerk of the Supreme Court of Illinois. A Petition for Rehearing, timely filed from that decision, was denied on January 10, 1969.

A Petition for Leave to Appeal to the Supreme Court of Illinois, filed February 11, 1969, was granted March 24, 1969.

The Opinion of the Supreme Court of Illinois affirming the judgment of the Illinois Appellate Court, First Judicial District, was entered January 21, 1970, and is reprinted herein in the printed appendix and in the record filed simultaneously herewith and certified by the Clerk of the Supreme Court of Illinois.

A Petition for Rehearing filed February 9, 1970, was denied on March 23, 1970.

STATEMENT OF JURISDICTION

The order of the Supreme Court of Illinois affirming the judgment of the Illinois Appellate Court, First Judicial District, was entered on January 21, 1970. On the 23rd day of March, 1970, a Petition for Rehearing filed February 9, 1970, was denied. This Petition for Writ of Certiorari is filed within ninety (90) days from said March 23, 1970.

The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. When an accused is charged in two counts for the same act, and in the same words, but under different statutes, and in a commingling of statutory language, has he been "informed of the nature and cause of the accusation" against him, so as to satisfy the requirements of the Sixth Amendment to the Constitution of the United States?

2. When an accused is charged in exactly the same words for the same act, in two counts, in language so non-descriptive, that the trial judge does not know until after the conclusion of the State proof whether a misdemeanor or a felony was intended as the thrust of the charge, is there not clearly demonstrated a violation of the Sixth Amendment to the Constitution of the United States?

3. When exactly the same act is charged in two counts, to-wit: that the petitioner, and another "intentionally and knowingly, without legal justification, committed a battery on George Quarnstrom which caused great bodily harm to said George Quarnstrom," does not an acquittal on the first count, followed by a conviction on the second count, violate the prohibition against double jeopardy under the Fifth Amendment to the Constitution of the United States?

4. As a correlative, does not pleading that the accused committed a felony of aggravated battery in the first count or that he, by the same act, committed the misdemeanor of battery charged in the second count constitute disjunctive and ambiguous pleading, proscribed by the Sixth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V

AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV, Section 1

AMENDMENT XIV. — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 38, Section 12-3(a), Illinois Revised Statutes

§ 12—3. Battery

(a) A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.

(b) Penalty.

A person convicted of battery shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed 6 months, or both. 1961, July 28, Laws 1961, p. 1983, § 12-3.

Chapter 38, Section 12-4, Ill. Rev. Stat.

§ 12—4. Aggravated Battery

(a) A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery and shall be imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 10 years.

(b) A person who, in committing a battery, either:

(1) Uses a deadly weapon; or

(2) Is hooded, robed or masked, in such manner as to conceal his identity; or

(3) Knows the individual harmed to be a teacher or other person employed in any school and such teacher or other employee is upon the grounds of a school or grounds adjacent thereto, or is in any part of a building used for school purposes; or

(4) Knows the individual harmed to be a supervisor, director, instructor or other person employed in any park district and such supervisor, director, instructor or other employee is upon the grounds of the park or grounds adjacent thereto, or is in any part of a building used for park purposes; commits aggravated battery and shall be imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 5 years.

(c) A person who administers to an individual or causes him to take, without his consent or by threat or deception, and for other than medical purposes, any intoxicating, poisonous, stupefying, narcotic or anesthetic substance commits aggravated battery and shall be imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 5 years. 1961, July 28, Laws 1961, p. 1983, § 12-4; 1961, Aug. 1, Laws 1961, p. 2457, § 1.

STATEMENT OF THE CASE

On April 9, 1964, the petitioner herein was charged by indictment, together with his brother, in two counts as follows:

> "Indictment 64-1154: Count 1: The Grand Jurors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that *on December 6th, 1963,* at and within said County *Joseph Grieco* and Donald Grieco otherwise call Dom Grieco committed the offense of aggravated battery, *in that they, intentionally and knowingly, without legal justification, committed a battery on George Quarnstrom which caused great bodily harm to said George Quarnstrom,* in violation of Chapter 38, Section 12-4, of the Illinois Revised Statutes 1963, contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois.
>
> "Count 2: The Grand Jurors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid present that *on December 6th, 1963,* at and within said County *Joseph Grieco* and Donald Grieco otherwise called Dom Grieco committed the offense of battery, *in that they, intentionally and knowingly, without legal justification, committed a battery on George Quarnstrom which caused great bodily harm to said George Quarnstrom,* in violation of Chapter 38, Section 12-3, of the Illinois Revised Statutes 1963, contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois." (Abst. 1-2) (Our emphasis).[1]

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[1] The emphasis is to demonstrate, without unnecessary repetition hereinafter, that the act charged as crimes under each count is exactly the same.

After hearing the State's evidence, the Court, sitting without a jury, allowed a motion for a finding of not guilty with respect to Count 1. (Abs. 37) After both sides rested, this petitioner was found guilty under Count 2 and sentenced to a term of six months and a fine of $500.00, plus costs. (Abs. 5) His brother and co-defendant was sentenced to a period of supervision for two years. (Abs. 39)

Prior to the receipt of evidence, a motion to quash the indictment as insufficient, too broad, and not sufficient to apprise the defendant of the charge to satisfy the requirements of the Constitutions of the United States and the State of Illinois was denied. (Abs. 10)

The evidence disclosed that the complaining witness, one George Quarnstrom, in September of 1963, went to the Independent Loan Company. He had been given the address and the name of Don Grieco, and had called the loan company for an appointment. There he met Don Grieco and the petitioner, Joseph Grieco. He gave the information required by Donald Grieco and a few days later the $500.00 loan he sought was orally okayed. Donald Grieco told him the loan would be for $725.00 and that he would get $475.00, to be repaid at the rate of $28.00 in weekly payments. Up until December 6, 1963, he had made twelve payments, and on that date he was delinquent in one payment for a period of two days. On that date he went to a tavern by the name of Mike's Aragon. There he met the petitioner and his brother Donald where the two invited him into the washroom to talk. Once in the washroom, he was punched at least nine times in the face and about three or four times in the chest by Joseph Grieco, at the conclusion of which pummelling, the petitioner, Joseph Grieco, told Quarnstrom to not forget petitioner wanted Quarnstrom to "Get it in." (Abs. 11-15)

Quarnstrom came out of the washroom, was given a dampened towel to clean the blood from his face, and had a healthy shot and remained in the bar about forty-five minutes. (Abs. 25-26)

On December 9, 1963, Quarnstrom had a physical examination by a physician, which revealed multiple bruises and abrasions over the entire face and intercostal tenderness over the right chest wall. (Abs. 36) About two months later in February of 1964, Quarnstrom reported the incident to the police. (Abs. 23)

On appeal to the Illinois Appellate Court, this petitioner charged as reversible error, insofar as is pertinent here, that the indictment was so vague, indefinite, and uncertain as to violate the Constitutions of the United States and of Illinois, and the statutes of that State; and that it failed to inform the petitioner of the nature and cause of the accusation against him contrary to the Constitutions of the United States and of the State of Illinois. The Illinois Appellate Court found as follows:

> "An indictment may properly be phrased in the language of the statute when the statute itself particularizes the offense sufficiently for the defendant to know the precise offense with which he is charged. People v. Sims, 393 Ill. 238, 66 N.E.2d 86; People v. Klemann, 383 Ill. 236, 48 N.E.2d 957. The word 'battery' has a common usage apart from its technical use in the Criminal Code. It has been defined as the 'act of battering or beating.' Webster's New International Dictionary, 2nd ed., unabridged. In common parlance a battery is a beating and a beating is a battery. It does not require subtle language to describe its nature or elements. The charge that the defendant '[c]ommitted a battery on George Quarnstrom which caused great bodily harm to said George Quarnstrom' was sufficient to notify the defendant of the nature of the offense. Had he desired further details, he could have moved for a bill of particulars." *People* v. *Grieco*, 243 N.E.2d 417, 419-420.

On February 11, 1969, a Petition for Leave to Appeal was filed to the Supreme Court of Illinois setting forth, inter alia, the above bases of complaint. This Petition for Leave to Appeal was granted on March 24, 1969, and on January 21, 1970, the Illinois Supreme Court affirmed the decision of the Illinois Appellate Court, expressing agreement with its rationale:

> "We are in accord with the holding of the appellate court that the indictment here meets the test for certainty evolving from the foregoing decisions. The term 'battery' is one of common usage and understanding, and the statute itself sets forth all elements necessary to constitute the offense intended to be punished, *viz.*, causing bodily harm to an individual, intentionally and knowingly, without legal justification. Coupled with the allegations setting forth the name of the person upon whom the battery was committed, and the date it occurred, the indictment was sufficiently certain to enable defendant to prepare a defense and to permit any judgment entered to be pleaded in bar of a subsequent indictment for the same offense. *Cf. People* v. *Weil*, 244 Ill. 176.
>
> "Defendant's contention to the contrary, based principally upon decisions concerning the allegation of 'acts' constituting the crime as distinguished from the 'means' by which it was committed, is simply that the indictment is vague, indefinite and uncertain, and does not state an offense, because it fails to particularize the means by which the battery was committed. But it is only where the means used are an integral part of the offense that they need be averred. . . .
>
> * * *
>
> "Accordingly, we cannot agree that the indictment here was fatally defective simply because it did not allege the means, or that the omission denied to defendant the protection of the constitutional provisions upon which he relies." (A. 8-10)

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to the Supreme Court of Illinois in this case on the following grounds:

1. This petitioner was obliged to stand trial, notwithstanding his presumption of innocence, and left to conjecture and surmise as to whether he was being tried for a misdemeanor or a felony on account of the same act, in violation of the Sixth Amendment to the Constitution of the United States and the decision of this Court in *Evans* v. *United States*, 153 U.S. 584.

2. In the sanction of an indictment pleading mere conclusions, on the rationale that the crimes charged, i.e. "Battery" had both a legal meaning and one of common usage, and the implication that the term could have been intended to carry the legal meaning in one phrase and the common meaning in another, the State Appeals Courts have decided a Constitutional question in a manner contrary to applicable decisions of this Court in *United States* v. *Cruikshank*, 92 U.S. 542; *United States* v. *Hess*, 124 U.S. 483; *United States* v. *Carll*, 105 U.S. 611; *United States* v. *Britton*, 107 U.S. 655, and *Russell* v. *United States*, 369 U.S. 749.

3. This case presents an unusual question on the application of the Fifth Amendment prohibition against double jeopardy. The charge was made in two counts and in exactly the same fact allegations. A judgment of acquittal was entered as to the felony count, and, thereafter, a judgment of guilt on the misdemeanor count. Though never directly ruled upon by this Court, applicable decisions in *Benton* v. *Maryland*, 395 U.S. 784; *United States* v. *Sabella*,

2 Cir., 272 F. 2d 206, and *United States* v. *Marzani*, 69 S.Ct. 299, compel the conclusion that there was double jeopardy.

4. As a correlative, in charging that the same act described constituted a felony and a misdemeanor, as a practical matter, is a pleading in the disjunctive conceded by this Court to be violative of the Sixth Amendment in *United States* v. *Clarke*, 87 U.S. 92.

I.

This petitioner was charged in two counts, one, under the aggravated battery statute of the State of Illinois (Chapter 38, Section 12-4, Ill. Rev. Stats.) and, two, under the simple battery statute (Chapter 38, Section 12-3, Ill. Rev. Stats.). The act he was accused of committing is exactly the same under each of the two counts, to-wit: that he and another "intentionally and knowingly, without legal justification, committed a battery on George Quarnstrom, which caused great bodily harm to said George Quarnstrom."

The latter statute (§12-3) as far as is here pertinent, sanctions anyone who knowingly or intentionally without legal justification and "by any means" causes "bodily harm to an individual."

The former statute (§12-4), again so far as is here pertinent, sanctions as an aggravated battery, anyone who in committing a battery "causes *great* bodily harm" (Our Emphasis). An aggravated battery is also described as committed by one who, in committing a battery, uses a deadly weapon; is disguised; know the victim to be a school or Park District employee; or one who administers a narcotic to a victim without consent.

The two counts here involved charged that the petitioner by some undescribed act committed either the offense of aggravated battery or battery upon an individual "in that they intentionally and knowingly, without legal justification committed a battery . . . which caused *great* bodily harm." (Our Emphasis)

The Court will note that the term "*great* bodily harm" is used in the statutes only in respect to aggravated battery (§12-4), on which petitioner was acquitted at the close of the State's case. It would appear clear that, using the wording exclusive to the felony statute, the misdemeanor count should have been dismissed or quashed on motion, which was duly made. It was not, and, in fact, petitioner was convicted on the misdemeanor count.

> "Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the Court of the exact offense intended to be charged, . . . " *Evans* v. *United States* 153 U.S. 584, 587.

See also *United States* v. *Gordon*, 7 Cir., 253 F. 2d 177.

It is axiomatic that:

> "What is demanded, however, is a competent and forthright attempt to notify the accused of the extent of his alleged culpability." *Nelson* v. *United States*, 10 Cir., 406 F. 2d 1136, 1138.

We submit petitioner's Sixth Amendment rights were violated by this conviction.

II.

Excepting the ultimate result to the victim as charged, the two counts of the indictment are that the petitioner committed a battery or an aggravated battery "in that they . . . committed a battery . . . " It would seem clear that the indictment pleads merely a conclusion, and that

to plead a crime, the statutory words "by any means" would have to be given effect, and the "means" would have to be spelled out in the indictment counts as a necessary element.

The essential elements of the statutory offense "are matters of substance, and not of form, and their omission is not aided or cured by verdict." *United States* v. *Hess*, 124 U.S. 483. The omission of any fact or circumstance necessary to constitute the offense will be fatal. *United States* v. *Cruikshank*, 92 U.S. 542. Any such omission cannot be supplied "by intendment or implication, and the charge must be made directly, and not inferentially, by way of recital." *United States* v. *Hess*, *supra*.

The general issue made by the motion to quash is that the indictment herein is not sufficient in law to require the petitioner to plead thereto. There can be no doubt that the petitioner may rightfully claim the constitutional privilege of being fully "informed of the nature and cause of the accusation" against him. U. S. Constitution, Amendment 6. The principle of law thus embodied in the Constitution amounts in substance to a re-affirmation of essential common law principles. However, it is stronger than the common law because, being in the Constitution, it may not be changed or modified by either legislative enactment or court construction. So the real issue now before the Court is whether the defendant has been fully informed of the nature and cause of the accusation made against him. No element of the crime charged must be left to conjecture or surmise. As stated in *United States* v. *Potter*, 1 Cir., 56 F. 83, at page 89: "While it is ordinarily enough that the indictment declares an offense in the language of the statute, as has many times been said by all the courts, this is not universally true, and does not excuse the prose-

cutor from setting out every essential element constituting the crime. In order to properly inform the accused of the 'nature and cause of the accusation,' within the meaning of the constitution and of the rules of the common law, a little thought will make it plain, not only to the legal, but to all other educated minds, that not only must all the elements of the offense be stated in the indictment, but that also they must be stated with clearness and certainty, and with a sufficient degree of particularity to identify the transaction to which the indictment relates as to place, persons, things, and other details. The accused must receive sufficient information to enable him to reasonably understand, not only the nature of the offense, but the particular act or acts touching which he must be prepared with his proof; and when his liberty, and perhaps his life, are at stake, he is not to be left so scantily informed as to cause him to rest his defense upon the hypothesis that he is charged with a certain act or series of acts, with the hazard of being surprised by proofs on the part of the prosecution of an entirely different act or series of acts, at least so far as such surprise can be avoided by reasonable particularity and fullness of description of the alleged offense." See *United States* v. *Cruikshank*, 92 U.S. 542, 23 L.Ed. 588.

To the same general effect is the case of *Fontana* v. *United States*, 9 Cir., 262 F. 283, wherein it is said at page 286:

> "It is essential to the sufficiency of an indictment that it set forth the facts which the pleader claims constitute the alleged transgression, so distinctly as to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, and so clearly that

the court may be able to determine whether or not the facts there stated are sufficient to support a conviction. United States v. Britton, 107 U.S. 655, 669, 670, 2 S.Ct. 512, 27 L.Ed. 520; United States v. Hess, 124 U.S. 483, 488, 8 S.Ct. 571, 31 L.Ed. 516; Miller v. United States, 8 Cir., 133 F. 337, 341, 66 C.C.A. 399, 403; Armour Pkg. Co. v. United States, 8 Cir., 153 F. 1, 16, 17, 82 C.C.A. 135, 150, 151, 14 L.R.A.,N.S., 400; Etheredge v. United States, 5 Cir., 186 F. 434, 108 C.C.A. 356; Winters v. United States, 8 Cir., 201 F. 845, 848, 120 C.C.A. 175, 178; Horn v. United States, 8 Cir., 182 F. 721, 722, 105 C.C.A. 163, 167." See also United States v. Wagoner, 7 Cir., 143 F.2d 1.

That there was no understandable charge made against the petitioner is best demonstrated by the action of the trial court. A motion to quash for, *inter alia*, want of particularity, was made immediately prior to trial. It was denied. (Abs. 10). Immediately upon the State's resting its case, a motion for a finding of not guilty was made as to Count I, which was allowed. (Abs. 37)

The defense was then invited to put in its case, but it indicated there would be no rebuttal (sic), whereupon a finding of guilt was made as to Count II, even though the fact allegations of Count II were precisely the same as those relating to Count I. It is clear that the Court acted without regard to whether a valid charge had been brought, but rather whether a crime, any crime, had been proved, and the Court itself, until all the evidence was in, was not able to determine whether a statute was violated — and this he did irrespective of the charge.

The Appeals Courts of Illinois were able to excuse the fact that this petitioner was charged with committing a battery "in that they . . . committed a battery" by rationalizing that the word "battery" has both a legal meaning

and one of common usage and understanding, and apparently implies that the first use of the term in the indictment carried with it a legal connotation and the second use applied to common understanding of the term.

We take issue with the use of the Court's statement as a part of a seemingly logical premise upon which the Court concludes that the petititoner was properly apprised of the crimes upon which he was put to trial. The lower courts placed the petitioner in a position of having to determine whether the indictment intended the technical use or the common use. This, of course, creates as great an ambiguity as if the indictment merely read "Joseph Grieco committed the offense of battery" without any further particularization.

The Courts' rationalizations will not avail to support an indictment, the office of which is to advise an accused of the "nature and cause."

The fact that a statute, read in the light of the common law, enables the Court to infer the intent of the legislature "does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." *United States* v. *Carll*, 105 U.S. 611. See the illustration given by this Court in *United States* v. *Cruikshank*, 92 U.S. 542, 558, 23 L.Ed. 588, 593, in which the Court said:

> "It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny."

This correlative purpose of requiring factual statements of the ingredients of the charge so that a trial judge may rule intelligently was reenunciated by this Court in *Russell* v. *United States*, 369 U.S. 749, 768 (fn. 15).

Again, the petitioner was deprived of his Sixth Amendment rights by this conviction.

III.

It has been established that the double jeopardy clause of the Fifth Amendment is applicable to the states under the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U.S. 784, 787.

It is our submission that the first count failed to charge sufficient facts to make a charge of aggravated battery, but this does not prevent jeopardy attaching. As this Court has so aptly said:

> "In any case, this argument was answered here over 70 years ago in United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). In that case Millard Fillmore Ball was indicted, together with two other men, for the murder of one William T. Box in the Indian Territory. He was acquitted and his co-defendants were convicted. They appealed and won a reversal on the ground that the indictment erroneously failed to aver the time or place of Box's death. All three defendants were retried, and this time Ball was convicted. This Court sustained his double jeopardy claim, notwithstanding the technical invalidity of the indictment upon which he was first tried. The Court refused to allow the Government to allege its own error to deprive the defendant of the benefit of an acquittal by a jury. *Id.*, at 667-668, 16 S.Ct., at 1192, 1194. '[A]lthough the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error * * *,' and the Government could not

have the acquittal set aside over the defendant's objections. *Id.*, at 669-670, 16 S.Ct., at 1195. This case is totally indistinguishable." *Benton* v. *Maryland*, 395 U.S. 784, 797.

This is not such a case as is involved in *Green* v. *United States*, 355 U.S. 184, and the cases therein cited providing for conviction of a lesser included offense. Here, two charges were made against this petitioner on the same factual basis. Having been acquitted on the facts charged in the first count, the doctrine of *autrefois acquit* comes into play.

There can be no dispute that the two counts here could have been tried separately. In such event the jeopardy of the first count would have been an absolute bar to prosecution under the second count, even though brought under a different statute. See *United States* v. *Sabella*, 2 Cir., 272 F. 2d 206, 211.

> "The Fifth Amendment guarantees that when the government has proceeded to judgment on a certain fact situation there can be no further prosecution of that fact alone. The defendant may not later be tried again on that same fact situation, where no significant additional fact need be proved, even though he be charged under a different statute." *United States* v. *Sabella*, 2 Cir., 272 F. 2d 206, 212.

This case, of course, differs from the fact situation suggested in *Sabella* in that there was an acquittal on the first count before consideration was given by the Court to the second count.

As the District Court for the District of Columbia said in *United States* v. *Marzani*, 71 F. Supp. 615, affirmed 168 F. 2d 133, and affirmed by this Court 69 S.Ct. 299:

> "The test of double jeopardy through a multiplicity of counts is whether a conviction on one count and an

acquittal on another would bring about a contradiction on the face of the verdict." (71 F. Supp. at 618)

This case meets that test.

IV.

A necessary correlative of the foregoing invocation against the guarantee against double jeopardy, is that the indictment, when read hindsight actually amounts to a charge that by committing a battery against George Quarnstrom which caused great bodily harm to George Quarnstrom, this petitioner either committed an aggravated battery or a simple battery. Extended argument is not necessary to convince this court that such pleading is disjunctive and ambiguous, and forbidden under the mandates of the Sixth Amendment.

This Court, nearly one hundred years ago, already considered it a foregone conclusion that charging two crimes disjunctively offended against the Sixth Amendment.

> "It may be conceded that an indictment or a criminal information which charges the person accused, in the disjunctive, with being guilty of one or of another of several offenses, would be destitute of the necessary certainty, and would be wholly insufficient. It would be so for two reasons. It would not give the accused definite notice of the offense charged, and thus enable him to defend himself, and neither a conviction nor an acquittal could be pleaded in bar to a subsequent prosecution for one of the several offenses." *United States* v. *Clarke*, 87 U.S. 92, 104.

The Eighth Circuit considered the right of a defendant to be advised of the exact offense with which he was charged basic:

> "The basic principle of American jurisprudence is that no man shall be deprived of life, liberty or property without due process of law. In a criminal pro-

ceeding, the indictment must be free from ambiguity on its face; the language must be such that it will leave no doubt in the minds of the court or defendant of the exact offense which the latter is charged with. It should leave no question in the mind of the court that it charges the commission of a public offense." *Harris* v. *United States*, 8 Cir., 104 F. 2d 41, 45.

CONCLUSION

Wherefore, for the above and foregoing reasons, the Petitioner prays the Court issue its Writ of Certiorari to the Supreme Court of Illinois to review its decision in this cause.

Respectfully submitted,

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APPENDIX

OPINION OF THE APPELLATE COURT.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT:

The appellant Joseph Grieco, together with his brother Donald Grieco, was indicted for the crimes of aggravated battery and battery. They were tried by the court and found guilty on the battery count. The court fined defendant Joseph Grieco $500 and sentenced him to serve six months in the Cook County Jail. The codefendant Donald Grieco was placed under the supervision of the court for a period of two years. That appears to be a method by which the court retains jurisdiction for the purpose of observing the conduct of a defendant over a period of time before imposing a sentence.

In this appeal Joseph Grieco contends that the indictment failed to inform him of the nature of the charges against him, that it failed to charge an offense and that evidence was erroneously admitted of a threat against the complaining witness and of the transfer of certain money, both events having occurred after the alleged battery. The facts follow.

George Quarnstrom, the complaining witness, testified that in September 1963 he was in financial straits. A fellow employee referred him to the Independent Loan Company at 2015 Larrabee Street in Chicago. Quarnstrom went to a pizza parlor at that address and there was introduced to a man identified as Don Grieco. He applied for a loan and Grieco said he would let him know in a few

days whether a loan would be approved. Several days later the loan transaction was completed. The face amount of the loan was $725, but Quarnstrom testified that he received only $475. He was obligated to make 25 weekly installments of $28 each plus a final payment of $25. A collector appeared every week at the Chicago Daily News Building where Quarnstrom was employed and he (Quarnstrom) made the first twelve payments promptly. The thirteenth payment came due on December 4, 1963 and defendant was in default.

On December 6, 1963 Quarnstrom was in Mike's Aragon Tavern at Lawrence Avenue and Broadway in Chicago drinking beer. He testified that Don Grieco and the appellant Joseph Grieco entered the tavern at about 2:30 p.m. and asked to talk to him in the washroom. Donald Grieco stood by the door while Joseph Grieco struck Quarnstrom in the face about nine times and in the chest three or four times. Defendant concluded the meeting by saying, "Get the twenty-eight dollars in, you ....." Quarnstrom testified that following the altercation he bled from the mouth and nose and his face was swollen. The bartender gave him a towel and a drink of liquor, after which he washed his face and went home. Following the incident at the tavern he made six more payments on the loan. On one of those occasions Don Grieco came to collect the installment and Quarnstrom asked him, "Why did you have to do this to me? Only one payment behind," to which Grieco replied, "Look, don't get smart. I will throw you right out this window here."

On February 26, 1964, Quarnstrom went to the Chicago Police Department and received $28 which he then paid to a collector named "Al," to whom he had paid some of the previous installments. The serial numbers of the bills had been recorded by the police and the marked money

was later found during a search of a prisoner named Albert Si, identified as "Al," who had been arrested at the Grieco office along with the Grieco brothers.

We proceed to consideration of appellant's first contention — that the indictment was so "vague and uncertain" as to deprive him of his right to be apprised of the nature of the charges against him, as provided by the Fifth and Sixth Amendments to the Federal Constitution. Count II of the indictment upon which appellant was convicted recites in pertinent part that the appellant "committed the offense of battery, in that [he] intentionally and knowingly, without legal justification, committed a battery on George Quarnstrom which caused great bodily harm to said George Quarnstrom, in violation of Chapter 38, Section 12-3, of the Illinois Revised Statutes, 1963 . . . " The indictment describes the offense in virtually the same terms as the language of the statute. Ill. Rev. Stat., ch. 38, § 12-3 (1963).

An indictment may properly be phrased in the language of the statute when the statute itself particularizes the offense sufficiently for the defendant to know the precise offense with which he is charged. *People* v. *Sims*, 393 Ill. 238, 66 N.E.2d 86; *People* v. *Klemann*, 383 Ill. 236, 48 N.E. 2d 957. The word "battery" has a common usage apart from its technical use in the Criminal Code. It has been defined as the "act of battering or beating." Webster's New International Dictionary, 2nd ed., unabridged. In common parlance a battery is a beating and a beating is a battery. It does not require subtle language to describe its nature or elements. The charge that the defendant "[c]ommitted a battery on George Quarnstrom which caused great bodily harm to said George Quarnstrom" was sufficient to notify the defendant of the nature of the offense. Had he desired further details, he could have moved for a bill of particulars.

Defendant argues that he was prejudiced by the admission of evidence relating to a threat against the complaining witness. He contends that the threat constituted a separate offense not charged in the indictment and occurring subsequent to the alleged battery. Five days after the alleged battery and outside the presence of the appellant, Donald Grieco threatened to throw Quarnstrom through a window. Appellant argues that this evidence was irrelevant and prejudicial as to him. The defendants were tried together and no objection was made to the joinder. At the beginning of the testimony regarding the threat, counsel objected on behalf of both clients on the sole ground that the threat was made after the alleged battery. Counsel who tried the case did not object specifically on behalf of appellant who was not present when the threat was made nor did he ask the court to disregard the testimony as to Joseph Grieco. The sole objection preserved for review therefore is whether evidence of a subsequent act was properly admitted.

Evidence of other crimes is admissible where it shows motive or intent, absence of mistake or accident, or the existence of a common scheme or design. *People* v. *Lehman*, 5 Ill. 2d 337, 125 N.E.2d 506, citing 1 Wigmore, Evidence, § 216, 3rd ed., 1940. When, as here, the question is whether the defendant's conduct evidenced a plan to commit the charged offense, it was proper to admit evidence of subsequent conduct supporting the charge. Testimony regarding Donald's relationship with Quarnstrom bears upon Donald's motives and the degree of his participation in the alleged crime and it established a connection between Donald and the loan transaction which led to the beating.

Proceeding to the final point, appellant contends that the testimony regarding the transfer of marked money suggested that appellant was guilty of some undefined offense other than the battery and that he was prejudiced by that insinuation. The indictment charged that appellant intentionally and knowingly committed the battery. Existence of the debt and the methods employed to collect it relate to appellant's motive and intent. Quarnstrom testified that he made numerous payments to a collector other than the codefendants and that the marked money showed only that the payments were collected on behalf of the codefendants. All the evidence reveals that failure to keep current with the obligation was the motive for the attack on Quarnstrom. The State may show that a crime was committed pursuant to a conspiracy, even though the indictment does not charge a conspiracy, when that evidence tends to prove the intent, motive or common design to commit the crime charged. *People v. Novotny*, 371 Ill. 58, 20 N.E.2d 34.

We find no reversible error in the record. The judgment is affirmed.

JUDGMENT AFFIRMED

DEMPSEY, P. J. and SULLIVAN, J. CONCUR

OPINION OF THE SUPREME COURT OF ILLINOIS

Docket No. 41962 — Agenda 24 — November, 1969

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

vs.

JOSEPH GRIECO,

Appellant.

MR. JUSTICE CULBERTSON delivered the opinion of the court:

Defendant, Joseph Grieco, together with his brother, Donald Grieco, was charged by an indictment returned to the circuit court of Cook County with having committed the crime of battery upon the person of George Quarnstrom. After a bench trial, wherein the proof disclosed that defendant had struck Quarnstrom about the head and chest with his fists, defendant was found guilty and, on appeal, the judgment of conviction was affirmed by the appellate court. (*People* v. *Grieco*, 103 Ill. App. 2d 108). We have granted leave to appeal to further examine the contentions of defendant that the indictment is subject to constitutional infirmity and that it fails to state an offense.

The charge against defendant was based upon that part of section 13-2 of our Criminal Code which provides: "(a) A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual * * *." (Ill. Rev. Stat. 1963, chap. 38, par. 12-3.) So far as pertinent here, the indictment, couched in the language of the statute, was as follows: "The Grand Jurors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid present that on December 6, 1963, at and within said county, Joseph Grieco

and Donald Grieco otherwise called Don Grieco, committed the offense of battery, in that they, intentionally and knowingly, without legal justification, committed a battery on George Quarnstrom which caused great bodily harm to said George Quarnstrom, in violation of ch. 38, § 12-3, of the Ill. Rev. Stats., 1963, contrary to the statute, and against the peace and dignity of the said People of the State of Illinois."

It is the contention of defendant that the indictment is so vague, indefinite and uncertain as to be insufficient to apprise him of the nature and cause of the accusation, thus violating rights guaranteed him by the fifth and sixth amendments to the Federal constitution, and section 9 of article II of the Illinois constitution. Additionally, it is urged that the indictment does not state an offense because it fails to comply with an implementing provision of the Code of Criminal Procedure which directs that a criminal charge shall set forth "the elements and nature of the offense charged." (Ill. Rev. Stat. 1963, ch. 38, par. 111—3.) By the scope of defendant's argument, the single, narrow issue presented is whether the failure of the indictment to allege the means by which the battery was accomplished on the complaining witness caused it to offend the constitutional provisions and statute relied upon.

Both the constitutional provisions and the implementing statute are aimed at certainty, and it has been established by countless decisions that they are satisfied, and that an indictment is sufficient, if, as stated in 42 C.J.S., Indictments and Informations, § 100, pp. 978-981, the indictment states specifically the elements of the offense with sufficient particularity to apprise accused of the crime charged and to enable him to prepare his defense and permit a conviction or acquittal to be pleaded in bar of a subsequent prosecution for the same offense, and, as stated by some courts, to indicate to the court the correct judgment to be pro-

nounced on a verdict of guilty." (See also: *Hagner* v. *United States*, 285 U.S. 427, 76 L. Ed. 869, 52 S. Ct. 417; *United States* v. *Britton*, 108 U.S. 199, 27 L. Ed. 698, 2 S. Ct. 531; *Beauchamp* v. *United States* (6th cir.), 154 F.2d 413; *People* v. *Donaldson*, 341 Ill. 369; *People* v. *Green*, 362 Ill. 171; *People* v. *Lewis*, 375 Ill. 330; *People* v. *Patrick*, 38 Ill.2d 255; 21 I.L.P., Indictments and Information, § 55). Equally well established in this area of the law is the principle that an indictment phrased in the language of the statute creating the crime is sufficiently certain where the words of the statute so particularize the offense as by their use alone to notify the accused of the precise offense charged against him. (*People* v. *Sims*, 393 Ill. 238; *People* v. *Klemann*, 383 Ill. 236; *Brown* v. *United States* (9th cir.), 222 F.2d 293; *United States* v. *Ausani* (7th cir.), 240 F.2d 216.) But where the statute does not specifically define the crime, or does so only in general terms, some act showing an alleged violation of the statute must be averred. *People* v. *Green*, 368 Ill. 242, (reckless driving); *People* v. *Chiafreddo*, 381 214 (acts rendering a child dependent or neglected); *People* v. *Peters*, 10 Ill.2d 577, (representation of authorization to practice law); *Russell* v. *United States*, 369 U.S. 749, 8 L. Ed. 2d 240, 82 S. Ct. 1038, (refusal to answer question pertinent to inquiry by Congressional committees); see also; *United States* v. *Simmons*, 96 U.S. 360; 24 L. Ed. 819; *United States* v. *Cruikshank*, 92 U.S. 542, 23 L. Ed. 588.

We are in accord with the holding of the appellate court that the indictment here meets the test for certainty evolving from the foregoing decisions. The term "battery" is one of common usage and understanding, and the statute itself sets forth all elements necessary to constitute the offense intended to be punished, *viz.*, causing bodily harm to an individual, intentionally and knowingly without legal justification. Coupled with the allegations setting forth the

name of the person upon whom the battery was committed, and the date it occurred, the indictment was sufficiently certain to enable defendant to prepare a defense and to permit any judgment entered to be pleaded in bar of a subsequent indictment for the same offense. *Cf. People* v. *Weil*, 244 Ill. 176.

Defendant's contention to the contrary, based principally upon decisions concerning the allegation of "acts" constituting the crime as distinguished from the "means" by which it was committed, is simply that the indictment is vague, indefinite and uncertain, and does not state an offense, because it fails to particularize the means by which the battery was committed. But it is only where the means used are an integral part of the offense that they need be averred, as for example in the crime of assault with a deadly weapon, or the crime of assault with means likely to produce great bodily harm. A battery, the wilful touching of the person of another by the aggressor, or some substance put in motion by him, (Black's Law Dictionary, 3rd ed., p. 200,) is the consummation of an assault, and in 6 C.J.S., Assault and Battery, § 110g, p. 966, it is said: "It is necessary to aver the means employed where the means constitute an essential element of the offense * * *. It is not necessary, however, to allege the means or instrument used in making the assault where it is not an essential ingredient of the offense, * * * although it is not improper to do so." Similarly, it is said in 6 Am. Jur. 2d, Assault and Battery, § 90, p. 79: "An indictment or information is generally not insufficient because it merely alleges that an assault or battery was committed by defendant, but does not specify the mode in which it was committed, since such details are matters of evidence and not of pleading." (Accord: *State* v. *Gitaitis*, (Del.) 193 A. 2d 92; *Demonia* v. *State*, (Del.) 210 A. 2d 303; *Bell* v. *State*, 136 Me. 322, 9 A. 2d 129; *Hussey* v. *State*, 144 Miss. 380, 109 So. 871;

State v. *Twarog*, 97 N.H. 101, 81 A. 2d 855.) Comparably, in *Dunn* v. *People*, 158 Ill. 586, where the indictment charged assault with intent to murder, it was held that the gist of the offense was an assault with a felonious intent, making it unnecessary to set out the manner of assault with any degree of particularity.

Accordingly, we cannot agree that the indictment here was fatally defective simply because it did not allege the means, or that the omission denied to defendant the protection of the constitutional provisions upon which he relies. A bill of particulars was available to him had he desired or needed more details and, as a practical matter, the record of the case demonstrates no difficulty in preparing and presenting a defense. Quite clearly, the indictment and the judgment entered upon it are sufficient to support a plea of double jeopardy should the need arise.

No useful purpose can be served by further extending this opinion to consider contentions of defendant that improper evidence was admitted at his trial. Upon examination of the record and the authorities presented, we are of the opinion that those matters were properly treated upon and disposed of in the opinion of the appellate court.

The judgment of the appellate court is affirmed.

Judgment affirmed.

Mr. JUSTICE WARD took no part in the consideration or decision of this case.